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A Call for Blind Review: Student Edited Law Reviews and Bias

Jonathan Gingerich

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Introduction

A number of studies suggest that non-blind review of manuscripts submitted to professional journals (including law journals) disadvantages female authors relative to blind review. Studies also suggest that non-blind review encourages professional journals (and particularly law journals) to make decisions about manuscripts on the basis of letterhead prestige rather than article quality, which can make it difficult for younger scholars to publish their work even when it is quite good. There are some costs to adopting a blind review policy, including the administrative costs of ensuring that an article is appropriately blinded before it is reviewed. But these costs are likely outweighed by the benefits of adopting a blind review model, such as decreased reliance on letterhead prestige, better perceptions of the journal's review process by potential authors, and, theoretically, publication of higher quality articles. Therefore, I recommend that student run law reviews adopt the following policy:

We review submissions anonymously. We redact identifying information from submissions to ensure that no editor who participates in making any decision relating to whether a particular submission will be published knows the author's name, affiliation, academic credentials, prior publications, or pending publication offers. We request that authors submit manuscripts that are suitable for blind review.

Methods of Article Selection by American Law Reviews

Presently, law students run most law journals in the United States. A few journals are peer-reviewed faculty publications, and the number of such journals seems to be growing gradually, but they remain an exception rather than the rule. At student-run law journals, law students typically decide what articles to accept and reject. Occasionally student-run journals will farm out articles to faculty for feedback, but the practice is far from uniform.

Effectively, most student-run journals use a single-blind review method to decide whether to publish manuscripts that they receive.¹ Authors of submissions do not know the name

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of the article editor(s) who make(s) an initial decision about their submissions. However, the articles editors who read submissions to student-run law journals almost always know the identity of the authors whose submissions they evaluate.² Many authors submit cover letters or C.V.s along with manuscripts when they submit to student edited law journals, and student editors routinely review these documents side-by-side with manuscripts.³ In this article, I term the practice of student journals in reviewing manuscripts without masking the author's identity as "non-blind review."

Non-Blind Review and Bias

Despite its prevalence, the practice of non-blind review at student edited law journals causes several harms. Research suggests that non-blind review of journal submissions makes it harder for women and non-U.S. scholars to publish, leads to prestige bias that hurts younger scholars, and undermines the perceived fairness of the submission review process among authors.⁴ Non-blind review may also reduce readers' confidence in the reliability of the journal.

¹ This stands in stark contrast to publishing practice in most other academic disciplines, where journals are almost always peer reviewed. In many disciplines (including psychology, economics, and philosophy) submissions are routinely evaluated using "double-blind review," where articles are evaluated by a peer reviewer who does not know the author's identity and whose identity the author does not know.

² Dara Purvis, editor-in-chief of Volume 117 of the Yale Law Journal, claimed (plausibly) that Yale Law Journal's commitment to partial double-blind review (where the first editor to read an article knows the author's identity only if the author failed to remove identifying information from the manuscript) makes it an "industry leader" among student edited law reviews. Posting of Jack Chin to PrawfsBlawg, <http://prawfsblawg.blogs.com/prawfsblawg/2008/05/developments-in.html> (May 20, 2008, 12:22 EST); see also Brian Leiter's Law School Reports, <http://leiterlawschool.typepad.com/leiter/2008/05/the-yale-law-jo.html> (May 19, 2008). Jack Chin has also speculated that the non-blind review policies among student edited law journals are so widespread that authors submit their C.V.s with manuscripts even when they are instructed to prepare their manuscripts for blind review. Posting of Jack Chin to PrawfsBlawg, <http://www.typepad.com/t/trackback/346373/29124862/> (May 15, 2008, 15:07 EST).

³ See ExpressO, Submission Strategies: Editors Want to See Your C.V. Most of All, <http://law.bepress.com/expresso/2005/two.html> (last visited June 1, 2009) (noting that of the law reviews that use ExpressO to receive submissions, 81 percent request that a C.V. be included, and 68 percent request a cover letter).

⁴ Much of the research on these topics concerns double-blind peer review at scientific journals rather than blind review at law journals. I suspect that this disparity in the literature might result partly from the more professionalized nature of publishing in natural science relative to law. Since scientific journals generally use peer review systems, the concerns of such studies are somewhat different than the concerns of legal periodicals. However, to the extent that such studies point to non-discipline specific biases, they suggest that legal journals may face similar problems.

Gender Bias

Empirical evidence suggests that non-blind review may disadvantage women who submit articles to American law reviews. Last year, Minna J. Kotkin uploaded a working paper to SSRN titled *Of Authorship and Audacity: An Empirical Study of Gender Disparity and Privilege in the "Top Ten" Law Reviews*.⁵ Kotkin argued that women are underrepresented in fifteen of the most prestigious student-run American law reviews. She arrived at this conclusion by comparing the percentage of articles authored by women in these law reviews with the percentage of professors at these fifteen schools and at all AALS and ABA law schools. Specifically, Kotkin found that of 632 articles published in these law reviews between 2005 and spring 2008, 25.2 percent included at least one female author, and 20.3 percent were authored by one or more women and no men.⁶ In contrast, 35 percent of faculty members at AALS schools are women.⁷ Additionally, ABA data indicate that 31 percent of tenured and tenure track faculty at ABA institutions are women, including 27.1 percent of tenured professors and 44.2 percent of tenure track faculty (for whose career advancement, Kotkin notes, it may be particularly important to publish in high status journals).⁸ Kotkin further found that, with the exceptions of Yale, Harvard, and Chicago, women make up close to 31 percent of the faculty at the home schools of the fifteen law reviews that she studied.⁹ Kotkin acknowledges that this study does not prove that there is gender bias in the article selection process, because we do not have data about the composition of the potential author pool at the journals she studied and because her study does not use empirical methods to attempt to prove or disprove bias through testing.¹⁰

However, she suggests six hypotheses to explain the disparity between the data on the gender composition of law faculties and the breakdown of article authorship by gender. She evaluates the hypotheses that "article selection is affected by whether there is a critical mass of women on the faculty" of the law reviews' home schools and that "women are over-represented on law school faculties due to affirmative action and therefore less likely to succeed," and after evaluating these hypotheses concludes that they do not explain the paucity of women-authored articles in the top fifteen law reviews.¹¹ She considers the hypothesis that "there are still traditionally female subject areas less favored by these journals" and concludes that the available

⁵ Minna J. Kotkin, *Of Authorship and Audacity: An Empirical Study of Gender Disparity and Privilege in the "Top Ten" Law Reviews* (Brooklyn Law Sch. Legal Stud. Research Papers Accepted Paper Series, August 2008) *available at* <http://ssrn.com/abstract=1140644>; *see also* Posting of Christine Hurt to The Conglomerate, http://www.theconglomerate.org/2005/05/more_on_gender_.html (May 19, 2005); Posting of Orin Kerr to The Volokh Conspiracy, <http://volokh.com/posts/1116522166.shtml> (May 19, 2005 13:02 EST).

⁶ *Id.* at 17.

⁷ *Id.* Specifically, 29.3 percent of full professors are women, 46.8 percent of associate professors are women, and 53.9 percent of assistant professors are women. *Id.*

⁸ *Id.* at 35 (also noting that if full time clinical faculty members are included in the figure, women make up 38.6 percent of the total professoriate).

⁹ *Id.* at 36.

¹⁰ *Id.* at 6.

¹¹ *Id.* at 37-44.

data make it difficult to empirically evaluate this hypothesis. However, while the data may explain some of the disparity, it does not explain it all.¹²

She also examines three additional hypotheses, suggesting that women may be submitting their writing differently than men. These hypotheses are that “women simply write less because of either involvements in institutional matters or family/child commitments,” that “women undervalue their work,” and that women are simply less adept at legal scholarship and critical thinking.”¹³ She argues that the first two internal hypotheses may play some role in the disparity, suggesting that because some law review editors may *believe* the third, they might have an implicit bias against work authored by women.¹⁴ These hypotheses, Kotkin argues, are plausible enough that law review editors should consider whether their article review practices contribute to the gender disparity her data suggest.¹⁵

This finding of gender disparity is further substantiated by studies of blind review from scientific journals that have gathered data on the pool of potential authors.¹⁶ Most ecology journals do not practice double-blind review, but after the journal *Behavioral Ecology* instituted a double-blind review policy in 2001, the proportion of its acceptances that went to female first-authored papers increased by 7.9 percent.¹⁷ A study in *TRENDS in Ecology and Evolution* found that the proportion of female first-authored papers did not increase over the same time period in other ecology journals with similar citation rates and a similar trend in the number of articles published, suggesting that the increase could not be attributed to an increase of the proportion of women in the field or an increase in their scholarly productivity.¹⁸ This finding suggests that when editors know an author’s gender, the likelihood that female first-authored articles are accepted for publication might decrease.¹⁹

This finding was further substantiated by a study that Christine Wennerås and Agnes Wold conducted on single-blind peer-review scores of postdoctoral fellowship applications in

¹² *Id.* at 44-49.

¹³ *Id.* at 49-56.

¹⁴ *Id.* at 55.

¹⁵ *Id.* at 57.

¹⁶ Orin Kerr has suggested that, until a law journal studies the gender ratio of its submissions to accepted articles, it will be difficult to determine whether the selection process itself is gender biased. *See* Posting of Orin Kerr to The Volokh Conspiracy, <http://volokh.com/posts/1219195806.shtml> (Aug. 19, 2008, 21:30 EST).

¹⁷ Amber E. Budden et al., Double-Blind Review Favours Increased Representation of Female Authors, 23 *Trends in Ecol. & Evol.* 4, 4 (2007). Importantly, most ecology journal authors also submit articles with their full names rather than with their last names and first initials only. This enabled Budden et al. to code the authors for gender on the basis of first names. *Id.*

¹⁸ *Id.* at 5.

¹⁹ Kotkin’s hypothesis that “women undervalue their work” may play some role in explaining this disparity. Kotkin suggests that male authors tend to show more audacity in pushing their papers to editors, making phone calls and the like to journals to which they submit, and that this increases the likelihood that their papers are accepted and published. *See* Kotkin, *supra* note 5, at 54. There is also a possibility that an implicit gender bias may play a role in explaining this disparity. *Id.* at 55.

Sweden.²⁰ The authors constructed a model of scientists' scholarly productivity and compared scores that they received from reviewers. They found that male applicants were viewed by evaluators as significantly more competent than women who displayed the same level of scientific productivity.²¹ This effect could not be explained by "[t]he applicant's nationality, education, field of research or postdoctoral experience."²² This ruled out the possibility that female applicants did less well because they were affiliated with less prestigious universities or researched a field given low priority by the Swedish Medical Research Council.²³ Wennerås and Wold note "several studies have shown that both women and men rate the quality of men's work higher than that of women when they are aware of the sex of the person to be evaluated, but not when the same person's gender is unknown."²⁴ Wennerås and Wold's study suggests that this bias might also be present in situations such as the evaluation of academic work where the author's gender is known or easily discernible.

It is difficult to know, without further study, the extent to which this conclusion can be generalized to editorial evaluation of manuscripts by editors at student-run American law reviews, but the presence of this bias in scientific peer review should at least suggest that it is a significant factor in explaining the gender disparity in law review publishing that Kotkin found.²⁵ This is a substantial problem. As Kotkin notes, "as long as hiring, promotion and tenure have some relationship to publication placement, and law reviews aren't going out of business in the very near future, gender disparity should be considered."²⁶

²⁰ Christine Wennerås & Agnes Wold, *Nepotism and Sexism in Peer-Review*, 387 *Nature* 341 (1997). This study is unique because the authors were able to obtain peer-review scores, which are typically confidential. The study examined the peer-review scores of the Swedish Medical Research Council (a public entity), and a Swedish court found that the evaluation scores of the Swedish Medical Research Council were "official documents" and were required to be released by Sweden's Freedom of the Press Act. *See Tryckfrihetsförordningen [TF] [Constitution] 2:1* (Swed.). This enabled the authors to conclusively determine whether there was a correlation between gender and scores received in peer review in which the author's identity is unmasked. *Id.* at 341.

²¹ *Id.* at 342 (noting that for a female scientists to receive the same competence score as a male scientist, she had to publish "approximately three extra papers in *Nature* or *Science* or . . . 20 extra papers in . . . an excellent specialist journal such as *Atherosclerosis*, *Gut*, *Infection and Immunity*, *Neuroscience*, or *Radiology*").

²² *Id.* at 343.

²³ *Id.* at 342. The study did find that "applicants who were affiliated with a committee member received" higher scores than they otherwise would have, but the study found that this effect was cumulative with the gender effect. *Id.*

²⁴ *Id.* at 343; *see also* Veronica F. Nieva & Barbara A. Gutek, *Sex Effects on Evaluation*, 5 *Acad. Mgmt. Rev.* 267, 267 (1980) (finding such an effect in the context of employer evaluation of employees).

²⁵ Indeed, it may be difficult to conduct further studies specific to law reviews, given the short institutional memory of most student-run publications. Neither of the student-edited journals with which the author is associated have readily accessible data on the identities of authors who have submitted articles. Compiling this data would be very labor intensive, and neither of these journals currently has the editorial resources to undertake such a study.

²⁶ Kotkin, *supra* note 5, at 9.

Nationality Bias

It is possible that non-blind review makes it more difficult for non-U.S. scholars to publish their papers in American law reviews. Ann M. Link studied submissions to *Gastroenterology*, a medical journal, and found that both reviewers from the United States and reviewers from outside the United States “evaluate non-U.S. papers similarly and evaluate papers submitted by U.S. authors more favorably, with U.S. reviewers having a significant preference for U.S. papers.”²⁷ Specifically, U.S. reviewers voted to accept 38.2 percent of U.S. papers and only 34.1 percent of non-U.S. papers.

Again, without further study it is difficult to determine whether a similar finding might apply to student-edited American law reviews, and the reasons for this effect are not clear. For instance, these disparities might result from a host of factors including: a focus on topics less relevant to American readers, stylistic differences, and differences in how citations are used and formatted. For these reasons, it is arguably important for evaluators to know what country and academic culture an article is from. However, there is at least some possibility that editors have a bias in favor of papers from U.S.-based authors over equally meritorious papers written by authors from other countries.

Prestige Bias

In addition to checking for gender bias, Kotkin examined data from fifteen prestigious law reviews to determine whether law journals are more likely to publish articles by professors at prestigious law schools than equally good articles by authors at less prestigious schools, as the journals that she studied “publish virtually no authors who do not teach at ‘top 25’ schools.”²⁸ Kotkin found that of the 826 article authors she studied, “45 percent (325) come from the top 10 [*U.S. News & World Report*] schools, 61 percent (500) come from the top 25, and 70 percent (580) from the top 50. Authors from schools ranked above 50 account for only 13 percent (110) of the total.”²⁹ Kotkin notes that this might simply be because the most prestigious law schools hire all of the best scholars. However, she also points out that “given the vagaries of the job market today . . . it is hard to imagine that there is such a significant difference between the scholarship potential of those teaching in top 50 schools as compared to the rest of the professoriate.”³⁰

If law journals are publishing authors because of their prestigious institutional affiliations and institutions are basing hiring and promotion decisions (at least in part) on the basis of publication placement, there is something of a vicious cycle at work, making it very difficult for young scholars or scholars who attended non-elite law schools to break into legal publishing and academia. Just as troubling from a scholarly perspective is that “[r]eviewers might let inferior

²⁷ Ann M. Link, U.S. and Non-U.S. Submissions, 280 JAMA 246, 246 (1998).

²⁸ Kotkin, *supra* note 5, at 7.

²⁹ *Id.* at 23.

³⁰ *Id.*

papers ‘slide’ if they are submitted from a prestigious researcher or institution.”³¹ Furthermore, when journals have a limited number of book pages to allocate to articles (which is the case with many law journals and particularly specialized secondary law journals that publish less frequently than general interest law reviews), including bad scholarship by authors with fancy C.V.s or institutional affiliations disadvantages younger or less established authors. Therefore, the possibility of “letterhead bias” should be examined and remedied if possible.

Perception of Fairness

Judging from the comments on the PrawfsBlawg following Jack Chin’s post about the *Yale Law Journal*’s less than “blind review” process, a significant number of law professors believe that articles are not evaluated on their merits by student edited law reviews.³² The discontent of some legal professors with letterhead bias is very pronounced³³ and mirrors the feelings of professors in other disciplines. Every survey I found of authors who submit to a scientific journal concludes that authors prefer (often overwhelming) a system in which their identity is masked from reviewers. That finding holds true even in the few fields where studies have shown that the availability of double-blind review does *not* impact which articles are selected for publication.³⁴ It may well be that even if blind review is not truly any fairer than non-blind review it *looks* fairer to authors. Of course the applicability of this data to law journals is somewhat speculative until law journals conduct similar surveys, but the preference of authors for blind review seems to cut across disciplines. Given the generally negative impression that

³¹ Douglas S. Katz et al., Incidence and Nature of Unblinding by Authors: Our Experience at Two Radiology Journals with Double-Blinded Peer Review Policies, 179 Am. J. Roentgenology 1415 (2002).

³² See Chin, *supra* note 2, <http://prawfsblawg.blogs.com/prawfsblawg/2008/05/developments-in.html> (May 20, 2008, 12:22 EST).

³³ The Moneylaw Blog and the Classbias in Higher Education blog are good examples of this.

³⁴ See Roy M. Pitkin, Blinded Manuscript Review: An Idea Whose Time Has Come?, 85 Obstetrics & Gynecology 781, 782 (1995) (finding that 71 percent of authors favored double-blinding and only 16 percent opposed, and also finding that 78 percent of *readers* favored double-blinding and only 8 percent opposed); Glenn Regher & Georges Bordage, To Blind or Not to Blind? What Authors and Reviewers Prefer, 40 Med. Educ. 832, 835-36 (2006) (finding that “even the most experienced authors and reviewers had, on average, a 54 percent preference for concealing author names”; that “there was a clear and significant preference for less experienced authors and less experienced reviewers to indicate a desire for concealing author names more frequently, regardless of perspective”; and that 66 percent of respondents preferred either a double-blinding system where both author and reviewer identity is concealed or a single-blind reverse system where author identity is concealed but reviewer identity is not); Christian Smit, Peer Review: Time for a Change?, 56 BioScience 712 (2006) (“Interestingly, [a] clear preference for the double-blinded system existed across all groups [of authors] regardless of age, gender, academic position, and number of publications.”); David J. Stensrud & Harold E. Brooks, The Future of Peer Review, 20 Weather & Forecasting 825 (2005) (finding an author preference for double-blinding).

law professors hold of student edited law reviews,³⁵ law journals particularly should attempt to account for such preferences in designing their manuscript review processes.

The Case for Blind Review

In light of the substantial harms that are caused by non-blind review, I urge adoption of the blind review policy I proposed at the beginning of this article requiring editors to redact all identifying information from submissions prior to review to ensure that they decide whether to accept submissions without knowing authors' names, affiliations, academic credentials, or pending publication offers.

There is a possibility that the quality of articles published under a blind-review policy might be lower than under a non-blind policy, if letterhead is a good proxy for manuscript quality and editors are particularly bad at judging which articles are good and which are not. However, studies in scientific journals have found that article quality is not adversely affected by adopting a blind review policy.³⁶ Of course, since student edited law periodicals are edited by students rather than professionals, there might be a higher error rate. However, if they are skilled enough to edit articles for publication (and to choose between articles from equally prestigious authors) these student editors should also be able to separate the weaker articles from those worthy of publication. There is little reason to believe that letterhead is a good proxy for article quality, given the nature of the legal academic job market. Finally, since most student-run law journals aspire to influence public discourse, publishing the highest quality work is particularly important.

I recognize that blind review is not always possible, either because authors insert revealing cues about themselves in manuscripts or because editors can sometimes identify a prominent author, particularly one with a distinctive writing style. However, adopting a policy along the following lines would solve much of this problem:

Before sending a manuscript to the editor responsible for the initial read, a designated editor will remove any cover letter, C.V., cover page, header, and acknowledgement footnote from the manuscript, and will electronically search the document for any instances of the author's name and will redact it. The editor responsible for redacting information from the article will not be involved in any decision about whether to accept or reject the article.

Complying with this policy would involve minimal time yet prevent the most blatant self-identification that occurs.³⁷ Of course, for the policy to truly be successful, authors need to

³⁵ This view is indicated by almost every post about student edited law journals on faculty run law blogs.

³⁶ See Susan van Rooyen et al., Effect of Blinding and Unmasking on the Quality of Peer Review, 280 JAMA 234, 234 (1998) ("Blinding and unmasking have little effect on the quality of reviews of manuscripts."); see also Gaell Mainguy et al., Peer Review—The Newcomers' Perspective, 3 PLoS Biology 1534, 1534 (2005) ("[U]sing data from computer science, philosophy, or economics, which have adopted and have been using [double-blind peer review] for some time—the inescapable conclusion is that [double-blind peer review] performs at least as well as the traditional [single-blind] peer review process.").

³⁷ See Katz et al., *supra* note 31, at 1417.

adhere to blind review policies, but the propensity of authors to prefer blind review suggests that they might be willing to do so. Studies from scientific journals indicate that when authors comply with manuscript preparation guidelines for blind review, blinding is almost always successful.³⁸

Some editors and authors may argue that it is better to know author identity so that the editorial board can practice affirmative action in favor of younger scholars who are not yet established at prestigious law schools. However, implementing such a policy would be difficult at best, and might make established authors less likely to submit significant scholarship to a journal, which could reduce journal's academic profile, making it a less valuable place for young scholars to publish. Such a policy could end up undermining a journal's ability to help young scholars by providing them with a secondary journal publication.

A blind review policy may make it harder to detect redundant publications, since it would not be possible to search Westlaw's JLR database for pieces by the same author. Nevertheless, preemption checks are designed to unearth substantially similar pieces published by *anyone* not just the author of the submission. If this remains a concern, journals could institute this policy:

When we are prepared to accept an article for publication, but before it has formally done so, the editor responsible for ensuring that articles are appropriately blinded before the initial read will perform a preemption check limited to prior publications by the submitting author. If the same author has already published any substantially similar articles, we may then reconsider whether we wish to accept the article.

Implementing this policy would involve little administrative time, since only a very small number of articles make it to this stage. Moreover, the policy is a final check to ensure that the blind review process does not undermine the quality of the articles accepted.

Additionally, journals at schools with multiple student-edited law reviews could enhance the impact of adopting such a policy by coordinating with each other to implement a joint policy or adopt a joint statement on blind review. If a significant number of secondary journals at a large law school adopt such a policy, the snowballing effect could draw in journals at other schools as well, and redounding in the legal blogosphere to the public image of journals that adopt such a policy.

Conclusion

In order to reduce bias, increase authors' confidence in the fairness of the law review system, and improve relations with the law professors who write for them, student-edited law reviews would be well advised to adopt policies of blind review. Blind review can contribute significantly, if incrementally, to the aims of academic excellence, effective pedagogy, and ensuring fair equality of opportunity for legal academics. If adopted widely, such policies could also help to foster critical thinking by law review editors, who could not fall back on C.V.s and letterhead in place of critical evaluations of submission, and improve the quality of published legal scholarship by reducing the likelihood that academics with impressive C.V.s will coast on their reputations. While law reviews may face some difficulties in implementing blind review, but law reviews can resolve these difficulties with few downsides by adopting appropriate

³⁸ See Alfred Yankauer, How Blind is Blind Review?, 81 Am. J. Pub. Health 843, 844-45 (1991)

editorial policies. The experience of journals in related fields suggests that such policies would have a significant likelihood of success in meeting these important aims of scholarly engagement.